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Advocating for the Passage of Georgia's Religious Freedom Restoration Act

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TOPLINE POINTS

- State Religious Freedom Restoration Acts ensure that the government must meet the highest standard before restricting religious freedom and, even then, must choose the least restrictive option. America First stands for protecting faith from government overreach.
- The 1993 Religious Freedom Restoration Act was a federal law that protected religious liberty across the country until the Supreme Court struck it down in 1997.
- Since then, 28 states have passed their version of the former federal law.

INTRODUCTION

On December 15, 1791, the First Amendment was ratified as part of the Bill of Rights. It reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Since that day, religious freedom has been a cornerstone of the American republic. But despite being the first right granted to us by our founders, religious freedom has slowly eroded during our 248-year existence. The United States Supreme Court has steadily handed down rulings that have chipped away at religious freedom: the establishment of separation of church and state (*Everson v. Board of Education*, 1947), banning voluntary prayers in public schools (*Engel v. Vitale*, 1962), banning

school-sponsored scripture reading and recitations of the Lord's Prayer (*Abington School District v. Schempp*, 1963), creating the "Lemon Test," which requires government action to have a secular purpose (*Lemon v. Kurtzman*, 1971), and banning the display of the Ten Commandments in courthouses (*McCreary County v. ACLU of Kentucky*, 2005). Given the absence of current federal safeguards, state-level legislation is needed to ensure comprehensive protection against potential infringements on our religious freedom.

One state-level solution is the enactment of the Religious Freedom Restoration Act (RFRA). Georgia has no RFRA, setting it apart from fellow southern states—Alabama, Arkansas, Florida, Louisiana, Mississippi, South Carolina, Tennessee, and Texas—that enacted such laws. This brief explains the compelling rationale for Georgia to become the 29th state to enact a state RFRA law.

THE SHORT LIFE OF THE FEDERAL RELIGIOUS FREEDOM RESTORATION ACT

In 1993, Congress passed, and the president signed, a federal RFRA into law. The law enjoyed widespread support across party lines, receiving just three "nay" votes in the Senate, and demonstrated a rare moment of bipartisanship during an era of political polarization similar to the divide we see today. Its purpose was to prevent federal, state, and local governments from "substantially burdening" an individual's freedom to exercise religion. "Substantially burdening" is when the government interferes in a blatant and obvious way with a person's ability to exercise a right. This protection even applies when the burden comes from a generally applicable rule. While the passage of the RFRA was one of the few times in modern U.S. history where our legislative and executive branches worked together to protect a constitutionally enacted freedom, the RFRA only lasted until June 1997.

On February 19, 1997, the Supreme Court of the United States heard oral arguments for *City of Boerne v. Flores* (521 U.S. 507, 1997). In this case, the Roman Catholic Archbishop of San Antonio (Flores) wished to expand a church in the city of Boerne, Texas. The city of Boerne rejected the permit needed for expansion, citing zoning laws that prohibited the construction of new buildings in that area. Flores sued the city claiming that the city is not adhering to the statutory right to exemptions from generally applicable laws that substantially burden religious exercise laid out in the RFRA.

On June 25, 1997, the Court held in a 6-3 majority that Congress did exceed its Fourteenth Amendment enforcement powers under Section 5 of that amendment. Justice Kennedy wrote that RFRA imposed too strict of a standard for assessing laws that burden religious freedom. *City of Boerne v. Flores* (1997) saw the end of the RFRA, and jeopardized religious freedom on the state and local level.

THE IMPORTANCE OF A STATE-LEVEL RELIGIOUS FREEDOM RESTORATION ACT

The implementation of a state-specific RFRA provides an extra layer of protection for religious freedom outlined in the First Amendment. Given the impact of previous Supreme Court rulings,

such as *Employment Division v. Smith* (494 U.S. 872, 1990) and *City of Boerne v. Flores* (1997), which have weakened religious freedom at the federal level, states should take it upon themselves to strengthen religious freedom by embedding protections within their constitutions and state laws.

Specifically, *Employment Division v. Smith* (1990) was a Supreme Court decision that overturned the strict-scrutiny standard applied in the 1963 Supreme Court decision *Sherbert v. Verner* (374 U.S. 398, 1963) and limited the scope of the strict scrutiny applied in the 1972 decision *Wisconsin v. Yoder* (406 U.S. 205, 1972).

In light of the case law, states may require that their state government demonstrate a compelling interest, using the least restrictive means available, before substantially burdening religious practice.

Georgia's proposed RFRA aims to prevent the government from substantially burdening an individual's exercise of religion unless it demonstrates that the burden furthers a compelling governmental interest and is the least restrictive means of achieving that interest. This framework mirrors the federal RFRA and is consistent with legislation in neighboring states.

KEY REASONS FOR ENACTING A STATE RELIGIOUS FREEDOM RESTORATION ACT IN GEORGIA

- **Uniform Protections in Georgia:** A Georgia RFRA will ensure all citizens have consistent protections for their freedom of religion outlined in the Bill of Rights. It will prevent state or local governments from imposing greater restrictions than the federal government allows.

- **Legal Clarity:** A Georgia state RFRA will establish a clear and consistent "compelling interest" test for the courts to apply when hearing religious freedom cases. This provides a clear framework for how the state government and religious practitioners can coexist.

- **Creating a Cohesive Region:** Currently, Georgia and North Carolina are the only southern states without state-level RFRA Georgia's adoption of this legislation would establish a consistent legal standard across nearly the entire southern region of the United States, fostering a cohesive legal environment.

NEIGHBORING SOUTHERN STATES' VERSION OF R.F.R.A.

- **Alabama:** In 1999, the Alabama Religious Freedom Amendment was ratified as part of the Alabama state Constitution (Ala. Const. amend. 622). It was in response to two Supreme Court cases: *City of Boerne v. Flores* (1997) and *Employment Division v. Smith* (1990), which eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion. It guarantees that the freedom of religion is not burdened by state and local law; and provides a claim or defense to individuals whose religious freedom is burdened by government.

- **Arkansas:** In 2015, Arkansas enacted its own RFRA (Ark. Code Ann. § 16-123-401, 2015), which restored the compelling interest test as outlined in *Sherbert v. Verner* (1963), and *Wisconsin v. Yoder* (1972), guaranteeing its application in all cases in which the free exercise of religion is substantially burdened.

- **Florida:** In 1998, Florida enacted its RFRA (Ch. 761, § 1-761.061, 1998 Fla. Laws 412), which states the government cannot substantially burden a person's exercise of religion, even if the burden comes from a generally applicable rule. Florida's RFRA applies to all state laws both before and after the enactment. In 2001, Florida's RFRA was put to the test in *Abbott v. City of Fort Lauderdale* (2001). Though the city attempted to prevent Abbott from feeding the homeless on city grounds, the appeals court disagreed and sided with Abbott.

- **Louisiana:** In 2010, Louisiana enacted the Preservation of Religious Freedom Act (Act No. 793, § 1, 2010). It restored the compelling interest test as outlined in *Sherbert v. Verner* (1963), and *Wisconsin v. Yoder* (1972), rejecting the lower standard established in *Employment Division v. Smith* (1990). Louisiana's RFRA prohibits the government from substantially burdening religious exercise, even through neutral or generally applicable rules.

- **Mississippi:** In 2014, Mississippi enacted its RFRA (Miss. Code Ann. § 11-61-1, 2014). It was in response to the *Employment Division v. Smith* (1990) Supreme Court case and intended to restore the compelling interest test outlined in *Wisconsin v. Yoder* (1972), and *Sherbert v. Verner* (1963). It guarantees its application in all cases in which the free exercise of religion is substantially burdened.

- **South Carolina:** In 1999, South Carolina enacted the South Carolina Religious Freedom Act (S.C. Code Ann. § 1-32-10, 1999). It restored the compelling interest test as outlined in *Wisconsin v. Yoder* (1972), and *Sherbert v. Verner* (1963). Guaranteeing that a test of compelling state interest will be imposed on all state and local laws and ordinances in all cases in which the free exercise of religion is substantially burdened.

- **Tennessee:** In 2009, Tennessee enacted the Tennessee Preservation of Religious Freedom Act (Tenn. Code Ann. § 4-1-407, 2024). It prohibits state and local government entities from "substantially burdening" a person's free exercise of religion, even through generally applicable rules. In 2010, Tennessee's RFRA was put to the test in *Johnson v. Dr. Bruce Levy* (Tenn. Ct. App. Jan. 14, 2010). The appeals court sided with Johnson in her objection on religious grounds to an autopsy done on an executed prisoner due to the deceased prisoner's religious beliefs. The court ruled that the medical examiner failed to provide clear and convincing evidence that an autopsy was essential.

- **Texas:** In 1999, Texas enacted its RFRA (Tex. Civ. Prac. & Rem. Code § 110.003), guaranteeing its application in all cases in which the free exercise of religion is

substantially burdened. In 2009, Texas's RFRA was put to the test in *Barr v. City of Sinton* (Barr v. City of Sinton, 2009). The Texas State Supreme Court sided with Barr in his assertion that the city had violated his rights under the Texas RFRA when they passed an ordinance banning halfway houses which Barr was using to minister to released convicts.

- In addition to these eight states, 20 other states have enacted a version of the RFRA: Arizona, Connecticut, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Utah, Virginia, and West Virginia.

The language in the proposed Georgia RFRA mirrors legislation enacted in eight other southern states. Georgia's draft law, like its regional counterparts, focuses on protecting religious practices from significant governmental intrusion. Both Georgia's proposal and existing southern RFRAs create a high bar for restrictions, stating that the government can only interfere when there exists a compelling governmental interest, and even then, only through the least restrictive means possible to achieve that interest.

WHAT DOES GEORGIA SENATE BILL 36 DO?

The Georgia Religious Freedom Restoration Act will establish religious freedom protections within the state of Georgia by creating a legal framework that limits the government's ability to burden an individual's free exercise of religion.

Key provisions:

1. The government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability.

2. The government may substantially burden a person's exercise of religion only if it demonstrates that the application of the burden to the person is:

    a. In furtherance of a compelling governmental interest; and

    b. The least restrictive means of furthering such compelling governmental interest.

3. A person whose religious exercise has been burdened in violation of this chapter may assert the violation as a claim or defense in a judicial proceeding and obtain appropriate relief against the government.

4. In any action or proceeding to enforce a provision of this chapter, the court or tribunal may allow the prevailing party, other than the government, a reasonable attorney fee as part of costs.

5. In any action brought against a judicial officer for an act or omission taken in such an officer's judicial capacity, such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

CONCLUSION

Religious freedom has been a foundational pillar of the American republic since its ratification in 1791 and is one of the most important rights granted to Americans, separating our nation from the rest of the world. Yet, religious freedom has faced challenges throughout our history. The judiciary branch's evolving interpretation of religious freedom—specifically in cases like *Employment Division v. Smith* (1990), which lowered the standard of protection, and *City of Boerne v. Flores* (1997), which invalidated the federal RFRA—has created the need for states to take action to preserve this fundamental liberty.

If the Georgia legislature passes, and the governor signs the Georgia Religious Freedom Restoration Act in 2025, it would represent a crucial step toward restoring robust religious liberty protections for all Georgians. By requiring the government to demonstrate a compelling interest and use the least restrictive means when substantially burdening religious practice, Senate Bill 36 would reestablish the strict scrutiny originally intended to protect religious freedoms.

In an era in which religious liberty continues to face new challenges, Georgia should reaffirm its commitment to this foundational American principle. By joining the majority of states that have enacted a state-level RFRA, Georgia would strengthen the constitutional fabric of our republic and honor the vision of religious liberty that our founders enshrined in the First Amendment. The time has come for Georgia to become the 29th state to enact a Religious Freedom Restoration Act and secure this essential freedom for generations to come.

WORK CITED

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